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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. .....

MICHAEL BUDZANOSKI, etc., *et al.*,
Petitioners,

vs.

FRANK SABOLSKY, etc., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDICES

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No. .....

MICHAEL BUDZANOSKI, etc., *et al.*,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, UNITED MINE WORKERS OF AMERICA, DISTRICT No. 5, President, Secretary and members of the Executive Council,[1] respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on March 27, 1972, which partially reversed the District Court's Order dated November 23, 1970, wherein the Dis-

[1] Petitioners are determined as those named positions set forth in the decision of the United States Court of Appeals for the Third Circuit as to which that Court reversed the decision of the District Court as spelled out in the last paragraph of the decision of the Court of Appeals, Appendix C, *infra*, p. 47.

trict Court dismissed Respondents'[2] Complaint and denied Respondents' Motion for Temporary Restraining Order and/or Preliminary Injunction.

Opinions Below

The opinion of the United States District Court for the Western District of Pennsylvania (Appendix A, *infra*, pp. 17-32) was entered November 23, 1970, and is reported at 320 F. Supp. 161. The Order of the District Court entered February 8, 1971, amending its opinion entered November 23, 1970, does not appear to be reported (Appendix B, *infra*, p. 33). The opinion of the United States Court of Appeals for the Third Circuit (Appendix C, *infra*, pp. 35-47) is reported at F. 2d , and was filed on March 27, 1972.

Jurisdiction

The judgment of the Court of Appeals (Appendix D, *infra*, pp. 48-49) was entered March 27, 1972.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

The jurisdiction of the District Court was contended for by Respondents by virtue of 29 U. S. C. § 411, 29 U. S. C. § 412, 29 U. S. C. § 501(A), 29 U. S. C. § 185 and 28 U. S. C. § 1331 (R. 13a).[3]

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[2] Respondents are individually designated in the caption of the Complaint filed in the District Court, which caption is set forth in Appendix E, *infra*, pp. 50-55.

[3] All references to the appendix filed by Respondents in the Court of Appeals are designated (R. .....a).

Questions Presented

Respondents sought and were refused a declaratory judgment, permanent injunction, damages, preliminary injunction, and temporary restraining order in that sequence. Following the District Court's dismissal of Respondents' Complaint and denial of Motion for Temporary Restraining Order and/or Preliminary Injunction, the Circuit Court partially reversed on the basis of a broad reading of Section 501 of the Labor-Management Reporting and Disclosure Act ("LMRDA") (29 U. S. C. § 501), stating that it disagreed with the District Court's reading of the scope of that section. The Circuit Court, expressly, did not consider Respondents' jurisdictional claims alleged under 29 U. S. C. § 185 and 29 U. S. C. § 411, which claims the District Court had denied. The Circuit Court decision further compounds the confusion which has resulted from the discrepant interpretations of Section 501 by the several Circuits and Districts; *i.e.*, the broad or general interpretation vs. the narrow or literal interpretation. The questions presented for determination are:

1. Whether Section 501(a) of the LMRDA, taking into account the special problems and functions of a labor organization, forms a statutory basis which will permit courts to accept jurisdiction of cases which do not pertain to the duties expressly stated therein;

2. Whether Section 501(b) of the LMRDA permits a member of a labor organization to sue an officer, agent, shop steward, or representative of that labor organization without such member first having requested such officer, agent, shop steward, or representative to sue; and

3. Whether Section 501(b) of the LMRDA permits any proceeding to be brought thereunder without first having

obtained leave of court upon verified application and for good cause shown.

Statement of the Case

On February 10, 1970, the call for the 48th Consecutive and 21st Constitutional Convention of the United Mine Workers of America, District 5 (hereinafter "District 5") was sent to the local unions within the administrative area of District 5. On April 10, 1970, less than two weeks prior to the start of the Convention, twenty (20) members of local unions, the majority of whom were also plaintiffs in this case, brought suit against District 5 and some of its officers and board members. (*Marion Pellegrini, et al. v. United Mine Workers of America, District 5, et al.*, Civil Action No. 70-413, W. D. Pa.) In that action, the Complaint sought declaratory and injunctive relief as well as damages and alleged that the Constitution of the United Mine Workers of America (hereinafter "U. M. W. A.") and the Constitution of District 5 required that all local unions with less than ten working members be disbanded. It also alleged, without indicating how, that the maintenance of such locals increased administrative costs of the U. M. W. A. and District 5, allowed local union officials to evade the LMRDA, and served to perpetuate political control by incumbent officials.

Following a hearing on April 16, 1970, the Honorable Louis Rosenberg, District Judge, refused the requested relief because the District Court could not make findings sufficient to satisfy it that an injunction would be well founded or rested. Subsequently, that Complaint was dismissed.

The District 5 Convention proceeded during April 21-24, 1970 but, on account of disruptive actions by a dissident

group, the Convention was prevented from concluding its business. It reconvened for a second and final session on May 4 and 5, 1970, and concluded its business despite the disruptive tactics. The matters considered by the Convention were properly voted upon by duly elected and qualified delegates. The instant case sought to overturn the actions of a majority of those delegates.

On July 16, 1970, alleging to represent unnamed members of the U. M. W. A., Kenneth J. Yablonski, Esquire, wrote to W. A. Boyle, President of U. M. W. A., and Michael Budzanoski, President of District 5, contending that certain designated local unions existed in violation of the U. M. W. A. and District 5 Constitutions and requesting that they be disbanded. The letters (R. 36a-39a) further stated that the District 5 Convention had made certain changes in the District Constitution and requested that they be rescinded on the grounds that they were politically motivated and accomplished by use of delegates from the alleged unconstitutional locals. On July 24 and 29, 1970, the U. M. W. A. and District 5, through their respective attorneys, wrote to Mr. Yablonski requesting certain necessary information and promising upon receipt, to turn it over to Presidents Boyle and Budzanoski for consideration (R. 58a-61a). However, instead of supplying the requested information, Mr. Yablonski unilaterally abandoned any resort to internal union remedies.

On August 21, 1970, the Complaint in the instant case (R. 1a-39a), which is virtually identical with the Complaint in the prior action, was filed in the United States District Court for the Western District of Pennsylvania (Civil Action No. 70-1011), and Petitioners' Motion to Dismiss (R. 40a-43a) was filed on September 9, 1970. Approximately one and one-half months later, on October 20, 1970,

Respondents filed a Motion for Preliminary Injunction (R. 45a-47a) and, on that day, counsel met with the Honorable Gerald Weber, District Judge, to whom the case had been assigned. Argument on Petitioners' Motion to Dismiss was scheduled for November 18, 1970, and, in order to expedite consideration, Judge Weber directed Respondents to submit a brief limited to the question of jurisdiction by October 30, 1970, and directed Petitioners to file a responsive brief by November 12, 1970. The District Judge also requested Respondents' counsel to file a Motion for a Temporary Restraining Order (R. 48a), due to the approach of the District 5 election scheduled for early December, so that the issue concerning absentee balloting could be expeditiously heard in the event the District Court found jurisdiction.

On November 18, 1970, Judge Weber heard brief oral arguments on Petitioners' Motion to Dismiss and tentatively set November 25, 1970 for evidentiary hearing "in the event the matter is not otherwise disposed of by Order of this Court prior to that date". On November 19, 1970, Petitioners filed Amended Motion to Dismiss Respondents' Complaint (R. 64a-66a). On November 23, 1970, the District Court dismissed Respondents' Complaint and requests for injunctive relief for want of jurisdiction (Appendix A, *infra*).

On December 18, 1970, Respondents appealed from the Order of the District Court entered November 23, 1970. In its Opinion of March 27, 1972, the Court of Appeals held that the dismissal, by the District Court, as to U. M. W. A. and District 5 was proper (Appendix B, *infra*). Also, the Court of Appeals specifically did not consider Respondents' jurisdictional claims alleged under 29 U. S. C. §§ 185 and 411 (Appendix B, *infra*, fn. 4), which claims had

been dismissed by the District Court (Appendix A, *infra*). However, the Court of Appeals disagreed with the District Court's "reading of the scope of Section 501" and, in that respect, reversed and "remanded to the district court with directions to grant leave, *nunc pro tunc*, to file the complaint" (Appendix B, *infra*). The Court of Appeals also held, *contra* the District Court, that Respondents were not required, prior to bringing the instant action, to make request upon officials of the U. M. W. A. or District 5 to sue and wait a reasonable time for refusal or failure to sue; were not required to obtain leave of the District Court to bring the instant action; and were not required to show good cause by invoking internal remedies or otherwise (Appendix B, *infra*).

Reasons for Granting Writ

1. This case raises important questions of Federal law which have not been, but should be, settled by this Court. In *Kline vs. Burke Construction Co.*, 260 U. S. 226, 233-234 (1922) and *Healy vs. Ratta*, 292 U. S. 263, 1970 (1933), this Court enunciated the jurisdictional guidelines for statutory interpretation governing the Federal district courts and courts of appeals. The interpretive limitations placed upon the Federal courts inferior to this Court result from the fact that they exist only by statutory creation at the direction of Congress and have only such jurisdiction and power as is specifically conferred at the will of Congress, whereas the jurisdiction and power of this Court is derived directly from the Constitution. The principle is re-enunciated by Mr. Justice Clark in his dissenting opinion in *Horton vs. Liberty Mutual Insurance Co.*, 367 U. S. 348 (1961) where he states, at page 357:

> Only that judicial power expressly granted by statute may be exercised by the *nisi prius* courts (Citations omitted.)

Accordingly, it would seem a clear *sequitur* that any statute conferring subject matter jurisdiction upon a Federal district court or court of appeals must be strictly construed in order that the express written enactment not be perverted into a spring-board for judicially diving into all sorts of unintended jurisdictional enlargements. However, the Court of Appeals has now decided, in the instant case, that it and the District Court are not bound within the limits of subject matter set forth in Section 501(a) of LMRDA and that it may dispense with the procedural requirements and prohibitions prescribed by Section 501(b). In so doing, the Court of Appeals has reached an analogized position by drawing from the decision of this Court in *Wirtz vs. Hotel, Motel & Club Employees Union, Local 6*, 391 U. S. 492 (1968), which case involved rights and remedies provided under Title IV of the LMRDA. That decision did not involve, in any way, the provision of rights and remedies or subject matter jurisdiction under Title V of the LMRDA. That this Court considered the discussed matters of policy as related only to Title IV of the LMRDA, in its decision of *Wirtz vs. Hotel, Motel & Club Employees Union, Local 6, supra,* is clear from the following portion of Mr. Justice Brennan, delivering the opinion of the Court:

> A pervasive theme in the congressional debates about the elections provisions was that revelations of corruption, dictatorial practices and racketeering in some unions investigated by Congress indicated a need to protect the rights of rank-and-file members to participate fully in the operation of their union through processes of democratic self-government, and through the election process, to keep the union leadership responsive to the membership. This theme is made explicit in the reports of the Labor-Committees of both

> Houses of Congress. *It is reflected in the discrete provisions of Title IV and also of Title I, the 'Bill of Rights' for union members.* 29 U. S. C. § 411. *Title IV, and particularly § 401, was the vehicle by which Congress expressed its policy.* 391 U. S. at 497-8 (footnotes omitted) (emphasis added).

In addition to the conflict in the circuits, discussed hereinafter, created by some having adhered to the specific expressions of Section 501 and some having embarked into a judicial broadening of that legislation, the Court of Appeals has compounded the confusion by enunciating the ultimate extension; to wit, that the "efforts to invoke internal remedies of the union may affect the 'good cause' requirements of Section 501(b)", but complainants need not make a request upon union officers to sue, need not obtain leave of court to bring action against the union officers whom they did not request to sue, and need not even raise matters pertaining to specific money or property. In sum, the Court of Appeals has abrogated the entirety of Section 501(b), has broadly extended the substance of Section 501(a), and has opened the door to every union member with some imagined non-statutory cause to come into the district courts without observation for any prescribed procedures and harass the courts, as well as the unions, with vexatious litigation.

The Court of Appeals gave lip service to its understanding that Section 501(b) was designed to prevent the filing of harassing and vexatious suits, but stated that it could not see how entertainment of the complaint in this action would achieve that undesirable end. In view of the *facts*, it is difficult to see how the Court of Appeals could not see. In this instance, the District Court and District 5 have been harassed and vexed by two actions filed less than five months apart; both suits were virtually identical excepting

for the form of relief prayed, one being pre-convention and the other post-convention; both suits alleged violations of Section 501 of the LMRDA without averring any breach of fiduciary capacity involving specific money or property; in both cases the complainants ignored the requirements and prohibitions of Section 501(b); and both actions were dismissed by the District Court for want of jurisdiction. If, in the eyes of the Court of Appeals, these circumstances do not constitute harassment and vexation of the court and the union, it is hard to imagine what frequency of identical unfounded litigation will.

The question of whether judicial extension of jurisdiction beyond the express provisions of Section 501 and the attendant harassment and vexation, apparent in this instance, is permissible has not been decided by this Court. It is an important question and should be decided.

2. The decision of the Court of Appeals, permitting Respondents to prosecute an action based upon Section 501 of the LMRDA, in which action there is no averment of any breach of fiduciary capacity involving specific money or property, is in direct conflict with the decisions of the Second Circuit in *Gurton vs. Arons,* 339 F. 2d 371 (2nd Cir., 1964); *Coleman vs. Railway Clerks,* 340 F. 2d 206 (2nd Cir., 1965); and *Yanity vs. Benware,* 276 F. 2d 197 (2nd Cir., 1967), and the decision of the Ninth Circuit in *Phillips vs. Osborne,* 403 F. 2d 826 (9th Cir., 1968); as well as the decision of a number of district courts in *Guarnaccia vs. Kenin,* 234 F. Supp. 429 (S. D. N. Y., 1964); *Penuelas vs. Moreno,* 198 F. Supp. 441 (S. D. Cal., 1961); *Forline vs. Marble Polishers,* 211 F. Supp. 315 (E. D. Pa., 1962); *Charles vs. Federation of Musicians,* 241 F. Supp. 595 (S. D. N. Y., 1965); *Puma vs. Brandenburg,* 324 F. Supp. 536 (S. D. N. Y., 1971); and Richardson vs. Tyler, 309 F. Supp. 1020 (N. D. Ill., 1970).

These decisions construed Section 501(a) in accordance with its specific provisions defining the scope of the fiduciary capacity expressly enacted by the Congress. As is stated in *Gurton vs. Arons, supra:*

> It is equally clear that Section 501 of the L. M. R. D. A. has no application to the present controversy. A simple reading of that section shows that it applies to fiduciary responsibility with respect to the money and property of the union and that it is not a catch-all provision under which union officials can be sued on any ground of misconduct with which the plaintiffs choose to charge them. If further corroboration for this position be needed it will be found in the legislative history and in the law review articles cited by Judge Tenney in his opinion in the district court. 234 F. Supp. at 442-43.
>
> The provisions of the L. M. R. D. A. were not intended by Congress to constitute an invitation to the courts to intervene at will in the internal affairs of unions. Courts have no special expertise in the operation of unions which would justify a broad power to interfere. The internal operations of unions are to be left to the officials chosen by the members to manage those operations except in the very limited instances expressly provided by the Act. The conviction of some judges that they are better able to administer a union's affairs than the elected officials is wholly without foundation. Most unions are honestly and efficiently administered and are much more likely to continue to be so if they are free from officious intermeddling by the courts. General supervision of unions by the courts would not contribute to the betterment of the unions or their members or to the cause of labor-management relations (Footnote omitted).

The Court of Appeals, in the instant case, has embraced an extremely broad and almost totally boundless interpretation of Section 501(a) and, in support of its adoption, has cited the district court decision in *Highway Truck Drivers, Local 107 vs. Cohen,* 182 F. Supp. 608 (E. D. Pa.,

1960), aff'd 284 F. 2d 162 (3d Cir., 1960), cert. denied 365 U. S. 833 (1961). However, even the most cursory examination of the district court decision and even the Third Circuit's own decision in that case clearly shows that the complaint laid was the use of union funds for the payment of legal fees in court actions pending against certain officers of the union. While the decisions contain an inordinate amount of words contending for a broad interpretation of Section 501(a), they comprise unbridled dicta because the facts of the case fit squarely within the specific provision of Section 501(a).

The Court of Appeals also reaches out to the decision in *Johnson vs. Nelson,* 325 F. 2d 646 (8th Cir., 1963) for support of its contention that Section 501(a) must be interpreted broadly. Even though that decision states a "holding" that Section 501 "imposes fiduciary responsibility in its broadest application and is not confined in its scope to union officials only in their handling of money and property affairs", that "holding" is also pure dicta because the facts in the case show that the singular matter involved was the refusal of union officers to sign checks for attorneys' fees and costs incurred by members in actions against the officers under Title I of the LMRDA. This was clearly a matter involving handling of the union's money or property and nothing else.

Even if there were not, prior to the decision of the Court of Appeals in this case, direct conflict among the several circuits, there is now. This conflict should be resolved now by this Court.

3. The decision of the Court of Appeals, in permitting Respondents to avoid the requirements of Section 501(b) of the LMRDA making it a pre-requisite to request officers to sue, is in direct conflict with the decisions of the Second

Circuit in *Cassidy vs. Horan,* 405 F. 2d 230 (2nd Cir., 1968); and *Coleman vs. Railway Clerks,* 340 F. 2d 206 (2nd Cir., 1965); and the decisions of the Ninth Circuit in *Phillips vs. Osborne,* 403 F. 2d 826 (9th Cir., 1968).

The Court of Appeals decided that Respondents were not required to request the officers of District 5 to sue prior to bringing this action because "In view of the union officers' alleged 'interpretation' of the relevant constitutional provision, a request to sue would have been an exercise in futility". In *Coleman vs. Railway Clerks, supra,* the decision of the Second Circuit states:

> ". . . We hold that this provision of the statute is mandatory and that its requirement cannot be met by anything short of an actual request. An allegation of the futility of such a request will not suffice . . ."

In an effort to buttress its position, the Court of Appeals looks to its own boot straps, citing its decision in *Purcell vs. Keane,* 406 F. 2d 1195 (3rd Cir., 1969). However, in that case it is clear that the complainants had sent a letter demanding that the governing body of the union "take immediate steps to recover from the officers and agents whose names appear on the attached list the amounts of the unauthorized expenditures made by them" and advising that if their demand were not met promptly, they would bring suit.

The Court of Appeals also cites *Aho vs. Bintz,* 290 F. Supp. 577 (D. Minn., 1968), as supporting its position. The decision of the District Court for Minnesota does not support but, rather, defeats. There, the district court found that the complainants had telegraphed their request to the president of the union and had received a telegraphed refusal of their request. The district court then stated:

> ". . . The prevailing rule seems to be that the requirement is not jurisdictional beyond the making of an unsuccessful demand . . ."

There is now direct conflict among the several circuits concerning this jurisdictional pre-requisite. The conflict should be resolved now by this Court.

4. The decision of the Court of Appeals, in permitting Respondents to avoid the prohibitions of Section 501(b) of the LMRDA barring suit before obtaining leave of court upon verified application and for good cause shown, is in conflict with the decision of the Second Circuit in *Coleman vs. Railway Clerks,* 340 F. 2d 206 (2nd Cir., 1965), and the Ninth Circuit decision in *Addison vs. Machinists,* 318 F. 2d 504 (9th Cir., 1963).

The Court of Appeals held that it was not necessary for Respondents to obtain leave of court upon verified application and for good cause shown before bringing the instant action. In *Coleman vs. Railway Clerks, supra,* after discussing the requirement for request to sue, the decision of the Second Circuit states:

> " . . . Together with the further requirement of a showing of good cause and of securing court permission to proceed, the provision requiring a request is clearly designed to protect union officials from unjust harassment. If it is to serve the purpose for which it was included, it must be given full effect . . ."

In support of its holding, the Court of Appeals cites *Horner vs. Ferron,* 362 F. 2d 224 (9th Cir., 1966). However, it is clear that, in that case, plaintiffs did make prior application to the district court and hearings were held thereon. (See footnote 4). Although the Ninth Circuit does discuss, in that decision, the possibility that a verified complaint might be considered by the court to de-

termine whether or not there is "good cause", that discussion does not relate to a substitution of that procedure for the "application for leave" procedure provided by the statute, which latter procedure the Ninth Circuit holds to be required.

The Court of Appeals also cites *Executive Board, Local Union 28 vs. I. B. E. W.*, 184 F. Supp. 649 (D. Md., 1960). However, the facts in that case show that there was a verified complaint filed, plaintiff's counsel moved and was granted leave of court to proceed, *and no objection was made to the lack of formality.*

As pointed out above, the citations in "support" of the Court of Appeals do not actually raise a conflict with the Second Circuit and Ninth Circuit decisions. However, now there is a direct conflict between the Court of Appeals, on the one hand, and the Second Circuit and Ninth Circuit, on the other hand, as well as a quasi-conflict between the Court of Appeals and its own "support" citations. This conflict should be resolved now by this Court.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted. Perhaps of more practical importance, it is clear that the officers of a labor organization situated within the geographical area of one circuit should not be subject to an application of the same statute which is diametrically opposed to that to which those within another circuit are subjected. For this reason, as well, it is respectfully urged that this Petition should be granted.

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APPENDIX A

Opinion

IN THE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LOUIS ANTAL, *et al.*,

Plaintiffs,

vs.

MICHAEL BUDZANOSKI, *et al.*,

Defendants.

Civil Action No. 70-1011.

WEBER, *J.* November 23, 1970

Plaintiffs are a large number of individuals who are members of the United Mine Workers of America, an International Union, and belong to local unions within the jurisdiction of District 5 UMWA, a subordinate branch of said Union. They bring this action individually on their own behalf and on behalf of the other members of the Union. The individual defendants are the officers of District 5 UMWA sued in their official capacities and individually. Also named as defendants are District 5 of the United Mine Workers of America, a labor organization, having its principal place of business in Pittsburgh, Pennsylvania, and the United Mine Workers of America, Inter-

national Union, the parent organization of District 5, which has its principal place of business in Washington D. C., and which is a labor organization within the meaning of the statute in question [29 USCA 401 *et seq.*]. Also named are a large number of local unions of the UMWA, all of which are within the jurisdiction of District 5, UMWA.

The primary aim of plaintiffs' suit is to compel the District 5 officers to comply with alleged requirements of the Constitution of the UMWA, International Union, and the District 5 UMWA Union

Plaintiffs allege that the individual defendant officers have obtained control of the legislative and elective machinery of the District 5 organization by continuing to maintain local unions which do not contain the requisite number of ten working members required by the Constitution of the International Union and the Constitution of the District 5 Union which contains the same requirement. Plaintiffs further allege that by maintaining these "ghost" local unions the defendant officers secured or controlled the appointment of delegates to the 1970 District 5 Convention called for April 1970 at which time certain resolutions and amendments to the District 5 Constitution were adopted, which would not have been adopted without the votes of delegates from these locals. Particularly under attack are (1) increases in the Workmen's Compensation assessment levied solely on the working members of the Union (2) gerrymandering the sub-districts of District 5; and (3) permitting the casting of absentee ballots and other significant constitutional changes.

Prior to the 1970 Convention of District 5 the plaintiffs sought an injunction restraining the seating of such delegates from the "ghost" locals, but the Court declined to enter a preliminary injunction prior to the Convention and

later dismissed the Complaint without prejudice. *Pellegrini et al. v. UMWA et al.*, Civil Action No. 70-413, Western District of Pennsylvania.

Plaintiffs claim jurisdiction of this Court under 29 USCA 411, 412; 501(a); 185, and 28 USCA 1331.

The defendants have moved to dismiss the Complaint on the grounds that this Court has no jurisdiction on any of the grounds asserted. The difficulty of the Court with a pleading such as this is that when so many separate allegations of causes of action are alleged by so many party-plaintiffs against so many and such different types of defendants it becomes extremely difficult for the Court to find the specific jurisdictional grounds which connects any individual plaintiff with any separate defendant under the terms of the statutes which strictly limit the jurisdiction of the United States District Court to rather narrow and rather specifically confined causes of action, some of which contain specific procedural prerequisites.

The statutory limitations and restrictions were expressly imposed by Congress to avoid as much as possible judicial interference into the internal management of labor organizations and to compel, as far as possible, the parties involved to seek their remedies through the internal machinery of the labor organizations. See *Horner v. Ferron*, 362 F. 2d 224, 228 [9th Cir., 1966], and *Highway Truck Drivers v. Cohen*, 182 F. Supp. 608, 622 [E. D. Pa., 1960] affd. 284 F. 2d 162 [3rd Cir., 1960]. What the plaintiffs seek is declaratory relief with respect to the interpretation of the Constitutions of the labor organizations involved, injunctive relief against the continuance of certain practices alleged to be inconsistent therewith, and monetary damages payable to the defendant Unions as well as the individual plaintiffs, punitive damages, costs and fees. The

plaintiffs allege that this action is brought as a class action on behalf of all individuals who are members of the defendant organizations and further that although these organizations are named nominal parties-defendant the action is brought by the plaintiffs on their behalf and for their benefit.

In addition to the general relief which plaintiffs seek after a plenary proceeding they have also moved for a preliminary injunction directed solely against the casting of absentee ballots in the election scheduled for December 8, 1970, as was authorized by the constitutional amendment adopted in the April 1970 Convention under attack. We will consider the jurisdictional grounds alleged which are attacked by defendants' motion to dismiss, together with the motion for a preliminary injunction and the objections thereto.

I.

Plaintiffs' cause of action under Sec. 501 of the LMRD Act of 1959 [29 USCA 501] must be dismissed for the following reasons:

1. Sec. 501(b) permits a suit by a member against ". . . any officer, agent, shop steward, or representative of any labor organization." Therefore, plaintiffs may not maintain this action against the many local unions, District 5 UMWA, and UMWA International Union who are named parties-defendant. *Woody v. Sterling Alum. Prod.*, 244 F. Supp. 84 [D. C. Mo. 1965]; affd. 365 F. 2d 448 [8th Cir., 1966].

2. Sec. 501(b) provides that no such proceeding shall be brought "except upon leave of the court obtained upon verified application and for good cause shown . . .".

This record shows no such application made or leave granted. Such leave is a condition precedent to the bringing of such suit.

Addison v. Grand Lodge, 318 F. 2d 504 [9th Cir., 1963];
Coleman v. Brotherhood, 340 F. 2d 206 [2nd Cir., 1965];
Highway Truck Drivers v. Cohen, 182 F. Supp. 608 [E. D. Pa., 1960];
Purcell v. Keane, 406 F. 2d 1195 [3rd Cir., 1969];
Horner v. Ferron, 362 F. 2d 224 [9th Cir., 1966].

A factor in the showing of good cause requirement can be the extent to which plaintiffs have utilized or exhausted their internal union remedies. *Coleman v. Brotherhood, supra;* and *Purcell v. Keane, supra.*

3. Sec. 501(a) imposes the duties upon union officers "to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, . . .".

The Complaint contains no allegations of failure to hold money or property for the benefit of the organization nor of any expenditure not authorized by the Constitution or bylaws or resolutions.

Numerous cases have held that Sec. 501(b) remedies are available only on a cause of action dealing with the fiduciary responsibility with respect to the money or property of the union.

Gurton v. Adams, 339 F. 2d 371 [2d Cir., 1964];
Coleman v. Brotherhood, 340 F. 2d 206 [2nd Cir., 1965];

Halton v. McFarland, 215 F. Supp. 372 [D. C. Alaska, 1963];
Richardson v. Tyler, 309 F. Supp. 1020 [N. D. Ill., 1970];
Aho v. Blintz, 290 F. Supp. 577 [D. C. Minn. 1968].

Plaintiffs have cited the broad application of the term fiduciary duties as such duties are set forth in 29 USCA 501, particularly in the case of *Johnson v. Nelson,* 325 F. 2d 646 [8th Cir., 1963]. The language of *Johnson* is broad, but the case actually involved the refusal of certain union officers to pay monies as directed by a resolution of the local.

We can find no support for plaintiffs in either *Gartner v. Saloner,* 384 F. 2d 348 [3rd Cir., 1967], or *Purcell v. Keane,* 406 F. 2d 1195 [3rd Cir., 1969]. Both cases concerned the expenditure of union funds. Both concerned the power of the court to award legal fees as part of their power of relief, the question at issue in *Johnson v. Nelson, supra.* Neither applied Sec. 501(b) relief to anything but a problem involving expenditures of union funds. *Gartner, supra,* was a proceeding under 29 USCA 412 and *Purcell, supra,* was solely concerned with the "exhaustion of remedies" question in Sec. 501 cases.

Also *Highway Truck Drivers v. Cohen,* 182 F. Supp. 608 [E. D. Pa., 1960], affd. *per curiam* 284 F. 2d 162 [3rd Cir., 1960], although using broad language, enjoined union officers from paying legal fees from the union treasury for the defense of those officers in criminal proceedings against them arising out of the alleged misuse of union funds. Nor is *Falcone v. Dantinne,* 420 F. 2d 1157 [3rd Cir., 1969] at all pertinent to our issue.

In summary, we have found no Sec. 501(b) action arising out of any other circumstance than the use of union funds.

None of the other citations of plaintiffs are pertinent to this question of the scope of Sec. 501. In fact few deal with Sec. 501 causes of action.

4. Another procedural requirement to jurisdiction is lacking here. Sec. 501 requires a prior seeking of internal remedies.

It is particularly noted that the letter of request addressed to Defendant Budzanoski as President of District 5, UMWA, by counsel for plaintiffs [Exhibit B to the Complaint] does not address itself to fiduciary violation under Sec. 501, but rather to the alleged violation of the International and District 5 Constitution in allowing the alleged illegal unions to continue in existence.

A similar letter to W. A. Boyle, President of Defendant United Mine Workers of America, International Union, makes an identical complaint. Boyle is not a party-defendant here.

The pertinent requirement of prior administrative or internal relief before commencing the action is that *any member* of a labor organization may request a labor organization, or its governing board of officers to sue or recover damages, or secure an accounting or other appropriate relief, and upon their refusal or failure to do so within a reasonable time after being requested to do so, *such member* may sue *such officer, agent, shop steward or representative* to recover damages or other appropriate relief for the benefit of the labor organization.

The cases have required a strict adherence to the Congressional requirements:

> "The Act was not 'intended by Congress to constitute an invitation to the courts to intervene at will in the internal affairs of unions', rather, there was an underlying 'general congressional policy to allow unions

> great latitude in resolving their own internal controversies'. That policy is best subserved by close adherence to the words Congress chose to use in prescribing the conditions under which judicial resolution of such a controversy might occur. Particularly is this so where, as here, a statute which confers a new right as a matter of federal law also utilizes restrictive language in specifying the remedy for its infringement."
>
> *International Brotherhood of Teamsters v. Hoffa*, 242 F. Supp. 246 [D. D. C. 1965].
>
> (citations and footnotes omitted.)

Thus it has been held that *a member* must assert the breach of obligation by some *officer, agent, shop steward or representative* and request suit, and, after failure or refusal of the labor organization or its officers to sue, *such member* (*i. e.*, the one making the request) only may then sue *the alleged offending officer, agent, shop steward or representative.* 29 USCA 501(b).

See also:

> *Persico v. Daley*, 239 F. Supp. 629 [S. D. N. Y 1965].

While we find that the procedural prerequisites to our jurisdiction are lacking here, which require dismissal, even under the federal doctrine of notice pleading we hold that the present Complaint fails to set forth a violation of the specific duties which Sec. 501 imposes on officers which must be shown to give the court jurisdiction:

> "A simple reading of that section [Sec. 501] shows that it applies to fiduciary responsibility with respect to the money or property of the union and that it is not a catch-all provision under which union officials can be sued on any ground of misconduct with which the plaintiffs choose to charge them."
>
> *Gurton v. Arons*, 339 F. 2d 371, 375 [2nd Cir., 1964].

II.

Plaintiffs further allege a cause of action under Title 1, Sec. 101 of the LMRD Act [29 USCA 411] and the jurisdiction granted to the United States District Court to redress such violations in Sec. 102 [29 USCA 412].

Sec. 101 recites specific rights of union members which are protected: (1) the equal rights of members to nominate candidates to vote in elections, to attend meetings and participate in deliberations; (2) to meet and assemble and speak freely; (3) control of procedures for levying assessment and dues; (4) protection of the right to sue; and (5) protection against improper disciplinary action.

We cannot find in plaintiffs' complaint that a specific infringement of any of these rights of any individual plaintiff is alleged.

The gravamen of Plaintiffs' Complaint is that "the union's officers are willfully failing and refusing to enforce the union's Constitution" in relation to elections and election procedures.

The assertion was made by the plaintiff in *Martire v. Laborers' Local Union 1058*, 410 F. 2d 32 [3rd Cir., 1969] that his removal from office violated the constitution of both the Union and the District Council, and that this constituted a Sec. 101 violation and gave the court jurisdiction under Sec. 102. However, the Court of Appeals held:

> ". . . violation of a union or district council's constitution is not actionable *per se* under the LMRDA" (p. 36). (emphasis by the court.)

The Court further held at p. 36:

> "It is settled that 'it is only when * * * a claim is made that the constitution is being applied in such a

way as to deprive local members of their secured rights that the documents [constitutions] may be considered' ".[9]

It was also contended in *Mamula v. U. S. W. A.*, 304 F. 2d 108 [3rd Cir., 1962], that nominating and election procedures provided by the union's constitution and bylaws denied the plaintiff his rights under Sec. 101. The action was brought prior to the election in the district court. The district court denied the request for a temporary restraining order to enjoin the election, but subsequently held the election void. The Court of Appeals reversed.

On appeal the court found that Title I, Sec. 101 granted specific rights to union members and Sec. 102 required that the action be brought by the individual whose specific Sec. 101 rights were violated. We find no allegation of the specific Sec. 101 rights in this complaint of any individual plaintiff.

The Court continued at p. 113:

"Even if this were an action within the ambit of § 101(a)(1) of Title I, 29 USCA § 411(a)(1), it is clear that the plaintiff lacks standing to bring it. The enforcement provision for Title I is § 102, 29 USCA § 412, which provides that: 'any person whose rights secured by the provisions of this title have been infringed * * * may bring a civil action in the district court of the United States for * * * relief * * *'."

* * *

"There is nothing in the provisions of Title I or its legislative history that would give plaintiff standing as a candidate to bring this action."

* * *

---

[9] (citing) *Navarro v. Gannon*, 385 F. 2d 512, 516 n. 6, 520 [2nd Cir. 1967].

> "Furthermore, plaintiff does not have standing to enforce the rights of other union members."
>
> (citations omitted.)
>
> 304 F. 2d 108, 113.

In this Complaint there are over 100 plaintiffs. There is no allegation of deprivation of Title I, Sec. 101 rights of any individual plaintiff.

In *Mamula, supra,* the Court observed:

> "Title I guarantees union members an equal opportunity to vote, while Title I prescribes the procedures to be followed in nominating and electing union officers. It also, just as clearly, prescribes the remedies available to a union member where these procedures are not followed."
>
> 304 F. 2d 108, 109.

The Court indicated that Title IV, Sec. 401, 29 USCA §§ 481, 482 was the only machinery for control of election procedures. With one exception these procedures can be enforced only by the suit of the Secretary of Labor, after proper and timely request. The only exception allowing an individual suit is provided in Sec. 401(c) 29 USCA § 481(c) which guarantees candidates for union office the right to inspect union membership lists, and gives such bonafide candidate standing to sue prior to election for denial of this right. [See the Opinion of this writer in *Antal v. U. M. W. Dist. 5,* Case No. Civil Action 66-1434, where this right was enforced in this court.]

There is no allegation in this Complaint that any plaintiff is a candidate and has been deprived of his rights as a candidate, entitling him to bring an action under 401(c). Sec. 403 [29 USCA § 483] provides that the remedy given

to the Secretary of Labor to challenge an election alrea
conducted shall be exclusive.

In *Calhoun v. Harvey*, 379 U. S. 134 [1969], the Cou
considered complaints of plaintiffs who alleged that t
eligibility requirements governing candidates for offi
under the union bylaws and constitution deprived them
equal rights to nominate candidates, thus violating S
101(a)(1). The court of appeals had found that alleg
tions which charged a breach of Title IV rights in the el
tion process could give jurisdiction for a cause of acti
under Sec. 102. The Supreme Court disagreed with t
holding.

> "But Title IV, not Title I, sets standards for eli
> bility and qualifications of candidates and offici
> and provides its own separate and different admin
> trative and judicial procedure for challenging the
> standards" (p. 138).
>
> "Whether the eligibility requirements set by t
> union's constitution and bylaws were reasonable a
> valid is a question separate and distinct from wheth
> the right to nominate on an equal basis given
> § 101(a)(1) was violated" (p. 139).
>
> "We hold that possible violations of Title IV of t
> Act regarding eligibility are not relevant in determ
> ing whether or not a district court has jurisdicti
> under § 102 of Title I of the Act" (pp. 139, 140).

Defendant, quoting from the concurring opinion of J
tice Stewart, argues that the majority opinion of the Co
ignores the emphasis Congress gave to prompt judic
remedies under Title I by its modification of the traditio
requirement of exhausting internal remedies before res
to litigation. Justice Stewart goes on to note that S
403 does not conclusively eliminate pre-election remedi

> "At the least, state court actions may be brought in advance of an election to 'enforce the constitution and bylaws' " (pp. 145, 146).

While Justice Stewart disagreed with the restrictive application given by the majority to Title I rights, and Title IV remedies, because they foreclose relief of a time when it is most necessary, before an election, he recognizes this as a ruling of the majority. Of more importance, Justice Stewart agreed with the conclusion of the case, that the plaintiffs did not allege in their complaint nor demonstrate in their affidavits that the rules under which the election was conducted effectively distorted the basic democratic process. Therefore, he agreed that the Complaint should be dismissed for failure to state a claim for relief.

This is the fault of the present complaint. By its joinder of a multiplicity of plaintiffs, its allegation of a class action, by its joinder of a multiplicity of diverse defendants, both individuals and union officers, as well as the labor organizations, this complaint fails in its fundamental purpose:

> "Rule 8. General Rules of Pleading. A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . ., (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . ."
>
> Fed. R. of Civ. P. 8.

Because these are not present, the cause of action asserted under Sec. 401 of the LMRDA must be dismissed, without prejudice, and the motion for preliminary injunction to restrain the casting of absentee ballots must be denied.

III.

Plaintiffs also claim jurisdiction under Sec. 301 of the Labor-Management Relations Act of 1947 [29 USCA 185] which permits suits for violation of contracts between *an employer and a labor organization, or between labor organizations, or between labor organizations* to be brought in any district court of the United States.

Plaintiffs argue that this Section authorizes the courts to hear a wide range of labor controversies. This may be so, despite the variety of labor disputes that may arise, this court only has jurisdiction to hear that variety within the range of the jurisdiction granted. It is not alleged that a collective bargaining agreement is involved. Nor is this a suit between any labor organizations arising out of such a contract. While individual members may sue to establish their rights under such contracts, *Smith v. Evening News Assoc.*, 371 U. S. 195 [1962], there must be such a contract out of which the rights arise.

The grant of jurisdiction under Sec. 301 of the Labor-Management Relations Act of 1947 does not extend to internal union affiairs:

> "We have been cited no authority that would permit the union constitution to be used as a contract for jurisdiction under 301 in an intra-union problem unrelated to a collective bargaining agreement. Nor do we believe that it was the intent of Congress for the courts to use the Labor Management Relations Act to police the intra-union problems."
>
> *Hotel & Restaurant Employees Local 400 v. Ruby Svacek*, ____ F. 2d ____ [9th Cir., Sept. 18, 1970] Case No. 25,380, 75 LRRM 2427.

We find no allegation in this complaint to suppport a cause of action under 29 USCA 185, and this cause of action will be dismissed.

We decline to consider a claim of pendant jurisdiction upon a cause of action based on state law because such doctrine requires that the state derived cause of action must be pendant to a substantial federal claim of jurisdiction, which we do not find here. The exercise of pendant jurisdiction is a discretionary power even where it exists. Under the circumstances of this complaint, a clearly defined federal jurisdictional basis does not appear in any claim, and although we might retain a pendant claim where a substantial federal claim has been dismissed, we do not believe that its exercise is appropriate in this case. See *United Mine Workers v. Gibbs*, 383 U. S. 715 [1966].

IV.

Plaintiffs also raise the provisions of 28 USCA 1331 as granting jurisdiction by reason of a "federal question" being involved. However, since we have examined all of the specific rights granted under federal statutes as claimed in the complaint and their accompanying grounds of jurisdiction and have found none to sustain our jurisdiction, no federal question remains to be litigated

See *Flaherty v. McDonald*, 183 F. Supp. 300 [S. D. Cal. 1960].

Because some of the defenses raised by defendants in their motion to dismiss are based on jurisdictional prerequisities it is possible that the jurisdictional grounds raised therein may be cured and the cause reinstated. Furthermore, our decision being based on lack of jurisdic-

tion it is not an adjudication on the merits and must be made without prejudice.

ORDER.

AND NOW this 23rd day of November, 1970, it is ORDERED that:

1. Defendants' Motion to Dismiss for lack of jurisdiction is GRANTED and the Plaintiffs' Complaint is DISMISSED without prejudice;

2. Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction is DENIED.

GERALD J. WEBER,
United States District Judge.

cc: Kenneth J. Yablonski, Esq.,
505 Washington Trust Bldg.,
Washington, Pa. 15301.

Lloyd F. Engle, Jr. Esq.,
1312 Frick Bldg.,
Pittsburgh, Pa. 15219.

APPENDIX B

Order

IN THE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LOUIS ANTAL, *et al.*,

Plaintiffs,

vs.

MICHAEL BUDZANOSKI, *et al.*,

Defendants.

Civil Action No. 70-1011

AND NOW this 8th day of February 1971, it is ORDERED that the Opinion filed in this case on November 23, 1970, is hereby AMENDED as follows:

The words "the lack of" in the sixth line from the bottom of page 19 shall be deleted and the sentence begininng on the sixth line from the bottom shall read: "Under the circumstances of this complaint, a clearly defined jurisdictional basis does not appear in any claim . . ."

GERALD J. WEBER,
United States District Judge.

cc: Kenneth J. Yablonski, Esq.,
505 Washington Trust Bldg.,
Washington, Pa. 15301.

Joseph A. Yablonski, Esq.,
1001 Connecticut Ave. N. W.,
Washington, D. C. 20036.

Lloyd F. Engle, Jr., Esq.,
1312 Frick Bldg.,
Pittsburgh, Pa. 15219.

APPENDIX C

Opinion of the Court

(Filed March 27, 1972.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1083

FRANK SABOLSKY, etc., *et al.*,

v.

MICHAEL BUDZANOSKI, etc., *et al.*,
LOUIS A. ANTAL, *et al.*,

Appellants.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Argued January 18, 1972.

Before Adams and James Rosen, Circuit Judges and Stapleton, District Judge.

ROSEN, Circuit Judge.

This appeal requires review of the district court's order dismissing the plaintiff's complaint for lack of jurisdiction.

The plaintiffs are over 100 coal miners, suing individually and as representatives of all members of the United

Mine workers of America (UMWA), District No. 5. Named as defendants in the complaint filed on August 21, 1970 were the District President, Michael Budzanoski, District Secretary-Treasurer John Seddon, members of the District 5 Executive Board, Roland Nuccetelli, Frances McCallister, Albert Vilcoss, District Local 5, the International Union and thirty-seven local unions.

The gravaman of plaintiff's complaint is that both the International and District Constitutions require the disbanding of any local union with less than 10 working members;[1] that the officers of District No. 5 and the Inter-

[1] Article XIV of the UMWA International Constitution provides:

"Section 1. Local Unions shall be composed of 10 or more workers, skilled or unskilled, working in or around coal mines, coal washeries, coal processing plants, coke ovens, or in other industries designated and approved by the International Executive Board. . . ."

"Section 21. If any mine or colliery is permanently abandoned, or should any Local Union for any cause disband, or should its charter be revoked, the charter and all monies, supplies and property, including real estate belonging thereto, shall be taken over by the International Union; provided, that any remaining members of such Local Union in good standing shall be given transfer cards."

Section 19 of this same Article establishes the procedure to be followed in disbanding local unions:

"When a mine is abandoned indefinitely and all the members of the Local Union having jurisdiction over it have gone to work elsewhere, the Local Recording Secretary must notify the District Secretary of the fact, and the District Secretary must collect the charter, seal, monies, books, supplies, property, including real estate, belonging thereto and notify the International Secretary-Treasurer."

Article XIII, Section 1 of 1966-1970 District 5 Constitution provides that:

"Local Unions shall be composed of ten or more workmen, skilled or unskilled, working in and around coal mines . . ."; and "When a mine is abandoned indefinitely and all the members

(Footnote continued on following page)

national have persisted in disregarding the requirement to disband a number of Unions (37) with less than 10 working members; that the maintenance of these locals "serves to perpetuate the political control of the incumbent UMWA officials"; and that union funds are being expended in connection with the maintenance of these non-functioning local unions. This conduct is claimed to be in clear violation of the fiduciary duty embodied in Section 501 of the Labor Management Reporting & Disclosure Act[2] ("LMRDA") which declares that union officials "occupy positions of trust in relation to" the union and its members, and requires union officers to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and by-laws. The complaint further alleges that requests by plaintiffs seeking compliance with the pertinent constitutional provisions have been met with dilatory and equivocal responses by the International and District officers.

In addition to Section 501 of the LMRDA, *supra*, jurisdiction was alleged to exist under § 101 of the LMRDA (29 U. S. C. § 411); § 301 of the National Labor Relations Act of 1947 (29 U. S. C. § 185), and 28 U. S. C. A. § 1331. The district judge considered the primary aim of plaintiff's suit is "to compel the District 5 officers to comply with alleged requirements of the Constitution of the UMWA,

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(Footnote continued from preceding page)

of the Local having jurisdiction over it have gone to work elsewhere, the Local Recording Secretary must notify the District Secretary of the fact, and the District Secretary must collect the charter, seal, monies, books, supplies, property, including real estate, belonging thereto, and notify the International Secretary-Treasurer," Section 19.

[2] 29 U. S. C. 501(a).

International Union and the District 5 UMWA Union."[3] Because of the number of plaintiffs and the different types of defendants involved in this suit, the court noted its difficulty in finding "the specific jurisdictional grounds which connects any individual plaintiff with any separate defendant under the terms of the statutes which strictly limit the jurisdiction of the United States District Court to rather narrow and rather specifically confined causes of action, some of which contain specific procedural prerequisites."

Because the district court disposed of the matter on a motion to dismiss, we take the plaintiffs' allegations as true for the purpose of this appeal. *Kahan v. Rosenstiel*, 424 F. 2d 161 (3d Cir. 1970), *cert. denied* 398 U. S. 950 (1970); *Frank Mashuda Co. v. Allegheny County*, 256 F. 2d 241, 242 (3d Cir. 1958), aff'd 360 U. S. 185 (1959). We conclude that the district court erred in finding a lack of jurisdiction under the section 501 claim, and confine ourselves to a statement of the principles relevant thereto,[4] which are set forth *seriatim:*

(1) The District Judge held that Section 501(b) of the LMRDA permits suits against "• • • any officer, agent, shop steward, or representative of any labor organization," and that the many local unions, District No. 5 UMWA and

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[3] "What the plaintiffs seek is declaratory relief with respect to the interpretation of the Constitutions of the labor organizations involved, injunctive relief against the continuance of certain practices alleged to be inconsistent therewith, and monetary damages payable to the defendant Unions as well as the individual plaintiffs, punitive damages, costs and fees." 320 F. Supp. 161, 163 (W. D. Pa. 1970).

[4] We need not reach appellants' jurisdictional claims alleged under 29 U. S. C. § 185 and § 411. The District Court has subject matter jurisdiction. The trial court will have an opportunity to determine whether plaintiffs have a claim under Section 101 of the LMRDA as the facts are more fully developed.

the UMWA International Union may not properly be joined in this suit. Misjoinder or non-joinder of parties is not ground for dismissal. F. R. Civ. P. 21, 28 U. S. C. A. The proper remedy in case of misjoinder is to grant severance or dismissal to the improper party if it will not prejudice any substantial right. The complaint was properly dismissed as to the UMWA International Union and District Union No. 5. *Aho v. Bintz*, 290 F. Supp. 577 (D. Minn. 1968).[5] However, the order of dismissal should not have been granted to the District 5 officers, who clearly fall within the statutory definition of the LMRDA.[6] (2) The district court further found that the procedural requirements[7] of Section 501(b) of Title 29 require strict compliance, and plaintiff's failure to observe these requirements mandated dismissal.

No formal hearing was held in the district court on defendant's motion to dismiss and plaintiff's motion for preliminary injunction. The motions were decided on briefs. It appears from the record that the failure of plaintiffs to apply for leave of court to file this suit was raised for the first time in the district court's opinion. The court did not make a specific finding that good cause had not

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[5] Cf. *Woody v. Sterling Aluminum Products, Inc.*, 244 F. Supp. 84 (E. D. Mo. 1965), aff'd. 365 F. 2d 448 (8 Cir. 1966), *cert. denied*, 386 U. S. 957 (1967).

[6] 29 U. S. C. Sec. 402. Definitions:

'(q) "Officer, agent, shop steward, or other representative," when used with respect to a labor organization, includes elected officials and key administrative personnel, whether elected or appointed (such as business agents, heads of departments or major units, and organizers who exercise substantial independent authority, but does not include salaried nonsupervisory professional staff, stenographic, and service personnel.'

[7] Sec. 501(b) provides that no such proceedings shall be brought "except upon leave of the court obtained upon verified application and for good cause shown * * *."

been shown. It noted in passing that one factor in the showing of good cause requirement "can be the extent to which plaintiffs have utilized or exhausted their internal union remedies."

The complaint in this case was verified by over 100 plaintiffs. Section 501(b) specifically allows an "*ex parte*" grant of leave to proceed. The appellants contend that by filing the complaint they, in effect, made an *ex parte* application to the court. It has been held that a lack of formality in observing the procedures of Section 501(b) will not bar a court from granting leave, where appropriate. *Executive Board Local Union 28 v. I. B. E. W.*, 184 F. Supp. 649 (D. Md. 1960). As the court said in *Horner v. Ferron*, 362 F. 2d 224 (9th Cir. 1966), "The allegations of the verified complaint may be sufficient to determine whether there is 'good cause.'" Accordingly, the case will be remanded to the district court with directions to grant leave, *nunc pro tunc*, to file the complaint.

(3) The district court found that the complaint does not contain allegations of failure to hold money or property for the benefit of the organization nor of any expenditure not authorized by the Constitution, by-laws or resolutions, and that section 501(b) remedies are available only as a cause of action dealing with the fiduciary responsibility with respect to the money or property of the union. We read the complaint as setting forth allegations regarding the holding and expenditure of union funds. Moreover we disagree with the court's reading of the scope of Section 501.

Appellees point to the remarks of Senators Ervin and McClellan in Senate debate to support the contention that Section 501 relates solely to matters of money and prop-

erty. This contention reflects the erroneous equation appellees make of the Senate debate with the legislative history of Section 501. A complete study of that history reveals that Senate Bill 1555 was amended by H. R. 8342 and, as finally enacted, "extends the fiduciary principle to all of the activities of Union Officials and other Union Agents or representatives."[8] In *Highway Truck Drivers, Local 107 v. Cohen,* 182 F. Supp. 608 (E. D. Pa. 1960), aff'd 284 F. 2d 162 (3d Cir. 1960), *cert. denied* 365 U. S. 833 (1961), the district court observed that the LMRDA was enacted in the wake of Congressional findings of crime and corruption in the labor and management field, 29 U. S. C. § 401(b), and that Section 501 "attempts to define in the broadest terms possible the duty which the new federal laws imposes upon a union official." p. 617.

In *Johnson v. Nelson,* 325 F. 2d 646 (8th Cir. 1963), the court made a thorough analysis of the legislative history of

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[8] We note that H. Rep. No. 741 on H. R. 8342—known as the Elliott Bill—contained fiduciary provisions *identical* with those which became § 501(a) of the Landrum-Griffin Act.

The report in pertinent part provides:

> "Union officials occupy positions of trust. They hold property of the union and manage its affairs on behalf of the members. It is the duty of union officers just as it is the duty of all similar trustees to put their obligations to the union and its members ahead of any personal interest.
>
> "We affirm that the committee bill is broader and stronger than the provisions of S. 1555 which relate to fiduciary responsibilities. S. 1555 applied the fiduciary principle to union officials only in their handling of 'money or other property' (see S. 1555, sec. 610), apparently leaving other questions to the common law of the several States. Although the common law covers the matter, we considered it important to write the fiduciary principle explicitly into Federal labor legislation. *Accordingly the committee bill extended the fiduciary principle to all the activities of union officials and other union agents or representatives.*" (Emphasis supplied). United States Code Congressional and Administrative News, 86 Cong. 1 Sess., 1959, Vol. 2, pp. 2479-2480.

the LMRDA, and concluded that Section 501 imposes fiduciary responsibility in its broadest application and is not confined in its scope to union officials only in their handling of money and property affairs. In rejecting the narrow interpretation of Section 501 asserted by the union officers in *Johnson*, the court stated:

> "The Courts have with consistency refused to accede to the contention that § 501 is designed for the single purpose of establishing responsibility on the part of officers and other representatives in relation to the handling and managing of fiscal affairs of the labor organization. Quite to the contrary, indication is clearly present in the reported cases that § 501 should receive a broad and liberal interpretation and application."

In *Moschetta v. Cross*, D. D. C., 48 L. R. R. M. 2669 (1961), it was held that the right of the membership to a special convention had accrued and that the failure and refusal of the executive board and of the international officers to complete arrangements for and call a special convention was not authorized by the Union Constitution and constituted a breach of fiduciary duty under Section 501.

In *Falcone v. Dantinne*, 420 F. 2d 1157 (3d Cir. 1969), we drew upon the authoritative interpretation of the intent of Congress expressed in *Wirtz v. Hotel, Motel & Club Employees Union, Local 6*, 391 U. S. 492 (1968), where Justice Brennan speaking for the court highlighted the balance to be struck between the Congressional concern to avoid unnecessary intervention in internal union affairs and the policy expressed in the Act to protect the public interest by assuring that Union elections would be conducted in accordance with democratic principles. While the case deals with a different section of the LMRDA than the

instant case, the court's discussion of the purpose of the Act in a case involving the fair election provisions of Title IV is particularly instructive. To the extent that *Gurton v. Arons*, 339 F. 2d 371 (2d Cir. 1964), relied on by the court below, *over-emphasizes* the danger of judicial intervention in union affairs, we decline to follow it.[9]

(4) The district court found non-compliance with Section 501(b) in plaintiff's failure to pursue internal remedies before bringing suit. This point requires a brief statement of the events preceding the suit.

In April of 1970, a protest was lodged with the District No. 5 Executive Board charging that certain locals should not be allowed to send delegates to the convention because they were "bogus" locals composed entirely or primarily of pensioned workers rather than the ten or more working miners required by the District and International UMWA Constitutions. No affirmative action was taken. Pellegrini and several other UMWA District 5 members then filed suit in the United States District Court for Western Pennsylvania requesting that delegates from the alleged "ghost" locals be prohibited from being seated at a forthcoming

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[9] Judge Hastie recognized the careful balance which must be preserved by the courts in cases of this kind in *Harris v. International Longshoremen's Association, Local No. 1291*, 321 F. 2d 801, 805 (3d Cir. 1963). In *Lewis v. American Federation of State, County and Municipal Employees*, 407 F. 2d 1185 (3d Cir. 1969), a case involving union disciplinary proceedings, Judge Aldisert took note of the cautionary language of *Gurton, supra*, counseling against undue judicial intervention, concluding however that "total judicial abstention from the review of Union disciplinary proceedings is unacceptable. Such an abdication would be contrary to the clear directive of Congress that rights may not be impaired without strict adherence to procedural and substantive due process, including ultimate redress to the federal courts; it would also run counter to the traditional role the judicial *branch has fulfilled in protecting the exercise of all legitimate rights.*" p. 1192.

District No. 5 Convention. The complaint was dismissed without prejudice on April 20, 1970. Plaintiffs Louis Antal and John Chach challenged the seating of delegates from these locals at the convention, but no action was taken. Following the convention, counsel for plaintiffs addressed letters to the presidents of both the International and District 5 Unions, requesting the disbanding of the non-complying locals and the abrogation of certain Convention action in which delegates from these unions had participated.

The district court, in pointing to the letter of request addressed to defendant Budzanowski, noted that it "does not address itself to fiduciary violation under Section 501, but rather to the alleged violation of the International and District 5 Constitution in allowing the alleged illegal unions to continue in existence." 320 F. Supp. at 164. While it may be that no fiduciary violation with respect to specific monies or property is mentioned, we have already established that Section 501 was not intended to be limited to such a narrow construction.

The appellees claim that "the fiscal effect of this alleged misinterpretation is both indirect and miniscule.[10] *Cf. Horner v. Ferron,* 362 F. 2d 224 (9th Cir. 1966), where the rule is stated: "Defenses which necessitate the determination of a genuine issue of material fact, being beyond the scope of a summary judgment procedure, are beyond the scope of a proceeding to determine whether a section 501(b) complaint may be filed." The appellants are not required on a motion to dismiss to prove the fiscal effect of the alleged interpretation of the respective union constitutions. Appellees' contention that the fiscal impact of their

[10] Appellees brief, p. 14.

activity is minimal places in issue the fact and the degree of fiscal mismanagement. The determination of this issue is properly a matter for an evidentiary hearing. It does not merit consideration as a defense to plaintiffs' complaint in the context of a motion to dismiss.

Appellees argue that the complaint is directed to an alleged misinterpretation of a union constitution. They cite the familiar principle of *English v. Cunningham,* 282 F. 2d 848 (D. C. Cir. 1960), that courts will accept the correctness of an interpretation fairly placed on union rules by union's authorized officials. In the absence of any criteria in the record by which a union "interpretation" can be measured, the rule cannot be used to give *carte blanche* to union activity which is alleged to constitute a violation of the board fiduciary duties of union officials under the LMRDA. And courts have not hesitated to strike down so-called "authorized" union conduct, alleged to be based on a rule or by-law fairly interpreted, where such conduct violates the provisions of the *Landrum-Griffin Act. Retail Clerks Union, Local 648 v. Retail Clerks International Ass'n,* 299 F. Supp. 1012 (D. D. C. 1969); *Johnson v. Nelson, supra.*[11]

The final jurisdictional issue is whether plaintiffs have requested the governing board or officers of the union to sue and have been refused. "This is akin to the demand required in corporation law before a derivative suit by shareholders will lie. * * * This requisite of the statute also is similar to the rule of exhaustion of internal or administrative remedies which must be done before resort to the courts is sought." *Aho v. Bintz, supra.* We held in *Purcell*

[11] We note that most of the subject locals involved are not regarded as labor organizations within the meaning of the LMRDA because they contain no working members, and accordingly, the Labor Department exempts the locals from the financial reporting sections of the Act.

v. Keane, 406 F. 2d 1195 (1969) that there is no mandatory exhaustion of internal remedies requirement in suits brought under Section 501 of the LMRDA. We also stated that efforts to invoke internal remedies of the union may affect the "good cause" requirement of Section 501(b) under certain circumstances. A review of plaintiff's efforts in seeking union action before bringing suit does not present a picture of deliberate harassment. Sincere efforts were made by several plaintiffs to obtain compliance by direct impleader. The letter of request addressed to President Budzanowski, although not a request of the officer to sue, did seek internal relief, and in the circumstances then existing, with a District election fast approaching, cannot be deemed insufficient.[12] Compare *Aho v. Bintz, supra,* where the plaintiffs' allegation that they telephoned the International President for relief, which was denied by return wire, was deemed sufficient. In this case, as in *Purcell, supra,* strict use of any exhaustion requirement would not be warranted. In view of the union officers' alleged "interpretation" of the relevant constitutional provision, a request to sue would have been an exercise in futility.

Section 501(b) was designed to prevent the filing of harassing and vexatious suits brought without merit or good faith against union officials. *Highway Truck Drivers and Helpers Local 107 v. Cohen, supra,* p. 622, footnote 10. We fail to see how entertainment of the complaint herein will achieve the undesirable end which Section 501(b) was designed to prevent.

---

[12] In *Calagay v. Calhoon,* 309 F. 2d 248, 260 (5th Cir. 1962), the court stated: "Plaintiffs are not compelled to exhaust internal remedies of their union when their appeal would have to be made to the very officers against whom their complaint is directed."

The order of dismissal with respect to the District No. 5 President, Secretary and members of the Executive Council is reversed and the cause remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX D

Judgment

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1083

FRANK SABOLSKY, etc., *et al.*,

vs.

MICHAEL BUDZANOSKI, etc., *et al.*, LOUIS A. ANTAL, *et al.*,

Appellants.

(D. C. Civil Action No. 70-1011)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present:

Adams and Rosen, Circuit Judges and Stapleton, District Judge.

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District

Court, entered November 23, 1970, be, and the same is hereby reversed insofar as it directs dismissal of the complaint with respect to the District #5 President, Secretary and members of the Executive Council, and the cause is remanded for further proceedings consistent with the opinion of this Court. Costs taxed in favor of appellants.

ATTEST:

THOMAS F. QUINN,
Clerk.

March 27, 1972.

Certified as a true copy and issued in lieu of a formal mandate on April 18, 1972.

Teste:

THOMAS F. QUINN,
Clerk, United States Court of Appeals for the Third Circuit.

APPENDIX E

Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MARION PELLEGRINI, Executive Board Member, District #5, U. M. W. A., 22 Di Cio, Canonsburg, Pennsylvania; FRANK SABOLSKY, Marianna, Pennsylvania, Local Union 2874; JOHN McALPINE, New Kensington, Pennsylvania, Local Union 2242; LEON YABLONSKI, California, Pennsylvania, Local Union 6831; LOUIS A. ANTAL, 1829 4th Avenue, Arnold, Pennsylvania, Local Union 4426; NICK DeVINCE, New Salem, Pennsylvania, Local Union 1248; ROBERT ABBADINI, Vestaburg, Pennsylvania, Local Union 762; JOSEPH DANIELS, Bentleyville, Pennsylvania, Local Union 9873; CHARLES WASHLACK, Bentleyville, Pennsylvania, Local Union 1190; JOHN CHACK, New Kensington, Pennsylvania, Local Union 6566; VICTOR PIZZONI, JR., Fredericktown, Pennsylvania, Local Union 688; VINCENT ZMUDA, Craven Hill, Pennsylvania, Local Union 1190; PATSY J. BAVA, Bentleyville, Pennsylvania, Local Union 1190; MARION LADISIC, Cokeburg, Pennsylvania, Local Union 1197; NICK CECIL, Bentleyville, Pennsylvania, Local Union 1197; LEE KARPOFF, Cokeburg, Pennsylvania, Local Union 1197; MIKE McKETA, Cokeburg, Pennsylvania, Local Union 1197; LLOYD HRUTKAY, Beallsville, Pennsylvania, Local Union 1197; ZIGMUND KRIVITSKY, Ellsworth, Pennsylvania, Local Union 1190; ANTHONY BROSICK, California, Pennsylvania, Local Union 9873; JAMES P. SIMALA, Perryopolis, Pennsylvania, Local Union 9873; JOHN A. POVLISH, Fayette City, Pennsylvania, Local Union 9873; CHARLES HUDOCK, Bentleyville, Pennsylvania, Local Union 2244; MIKE HUDOCK, Bentleyville, Pennsylvania, Local Union 2244; THOMAS BRADY, Fredericktown, Pennsylvania, Local Union 688; ELI MATOVICH, Clarksville, Pennsylvania, Local

Union 688; ALBERT ABBADINI, Vestaburg, Pennsylvania, Local Union 762; JOSEPH VOLENSKY, Vestaburg, Pennsylvania, Local Union 762; WILLIAM J. CORFONT, Vestaburg, Pennsylvania, Local Union 762; RICK SAVAGE, Clarksville, Pennsylvania, Local Union 688; MIKE TEHI, Vestaburg, Pennsylvania, Local Union 762; PETER SABO, Clarksville, Pennsylvania, Local Union 688; MIKE SEMANCIK, Coal Center, Pennsylvania, Local Union 1787; TONY PAPPAS, California, Pennsylvania, Local Union 787; STEVE KOVICH, Van Voorhis, Pennsylvania, Local Union 1190; STEVE SEGEDI, Ellsworth, Pennsylvania, Local Union 1190; ANDY VAHALY, SR., Cokeburg, Pennsylvania, Local Union 1197; ANTHONY DOVSHEK, Eighty Four, Pennsylvania, Local Union 1197; JOE GOBLESKY, Cokeburg, Pennsylvania, Local Union 1197; THOMAS HUDOCK, Cokeburg, Pennsylvania, Local Union 1197; WILLIAM E. TAYLOR, Hiller, Pennsylvania, Local Union 1197; THOMAS TAYLOR, Brownsville, Pennsylvania, Local Union 1197; ROBERT F. SCENA, Brownsville, Pennsylvania, Local Union 1248; MARTIN CONNORS, Fairbank, Pennsylvania, Local Union 1248; STEVE VINCE, LaBelle, Pennsylvania, Local Union 1248; JOHN J. BENNETT, LaBelle, Pennsylvania, Local Union 1248; MIKE ZOLENSKY, LaBelle, Pennsylvania, Local Union 1248; STANLEY ADAMICK, LaBelle, Pennsylvania, Local Union 1248; MICHAEL R. BRITOVICH, Denbo, Pennsylvania, Local Union 1248; T. L. CUNNINGHAM, Uniontown, Pennsylvania, Local Union 1248; S. S. BELLO, Uniontown, Pennsylvania, Local Union 1248; JOHN DESIARO, Uniontown, Pennsylvania, Local Union 1248; JAMES L. HILES, Smithfield, Pennsylvania, Local Union 1248; TEDDY W. BIENIA, Scottdale, Pennsylvania, Local Union 1248; JESSE A. COLE, Dunbar, Pennsylvania, Local Union 1248; ROBERT OGLETHORPE, Dunbar, Pennsylvania, Local Union 1248; FRANK BLOUT, Masontown, Pennsylvania, Local Union 1248; FRANK OBERLUHMER, Smithfield, Pennsylvania, Local Union 1248; WILLIAM OBERLUHMER, Smithfield, Pennsylvania, Local Union 1248; JOHN A. STANSICK, Masontown, Pennsylvania, Local Union 1248; CHARLES N. LAUTIN, Van Voorhis, Pennsylvania, Local Union 1248; WALTER BEALHO,

McClellandtown, Pennsylvania, Local Union 1248; PAUL SIUETZ, Hibbs, Pennsylvania, Local Union 1248; STEPHEN L. PLISKO, McClellandtown, Pennsylvania, Local Union 1248; ANDREW J. FLOREK, Smock, Pennsylvania, Local Union 1248; JOHN DEPTO, Smock, Pennsylvania, Local Union 1248; THOMAS J. BOZEK, Smock, Pennsylvania, Local Union 1248; PETER P. TOTH, JR., Perryopolis, Pennsylvania, Local Union 1248; LOUIS KOVACH, Lemont, Pennsylvania, Local Union 1248; JAMES J. MULLEN, Uniontown, Pennsylvania, Local Union 1248; JOE STIFARKO, Uniontown, Pennsylvania, Local Union 1248; JOHN GAWLIK, Lemont Furnace, Pennsylvania, Local Union 1248; LOUIS BUTCH, Republic, Pennsylvania, Local Union 1248; RAY E. DUKE, Dunbar, Pennsylvania, Local Union 1248; JOHN CASSIDY, JR., Uniontown, Pennsylvania, Local Union 1248; HARRY L. NICKLOW, Leisenring, Pennsylvania, Local Union 1248; DAVID CAFFEY, Lamberton, Pennsylvania, Local Union 1248; STEVE WALLACE, Masontown, Pennsylvania, Local Union 1248; MARTIN MAGERKO, JR., New Salem, Pennsylvania, Local Union 1248; EDWARD KIELBASA, Brownsville, Pennsylvania, Local Union 1248; LLOYD SHAFFER, Brownsville, Pennsylvania, Local Union 1248; SAM ZORICHAK, Uniontown, Pennsylvania, Local Union 1248; DONALD E. BURKE, Footedale, Pennsylvania, Local Union 1248; TONY PASQUALE, Footedale, Pennsylvania, Local Union 1248; JOHN BURNS, New Salem, Pennsylvania, Local Union 1248; JOSEPH R. MANCHAS, Adah, Pennsylvania, Local Union 1248; GEORGE KIPITA, McClellandtown, Pennsylvania, Local Union 1248; MICHAEL F. ROCHEK, Uniontown, Pennsylvania, Local Union 1248; ANDREW SADOSKY, Uniontown, Pennsylvania, Local Union 1248; CHARLES McGURGAN, Uniontown, Pennsylvania, Local Union 1248; ROBERT DULLA, Republic, Pennsylvania, Local Union 1248; MELVIN M. McCOY, Uledi, Pennsylvania, Local Union 1248; A. J. BELLO, Uniontown, Pennsylvania, Local Union 1248; TONY TESTA, Burgettstown, Pennsylvania, Local Union 7447; ANDREW KUZIO, Clinton, Pennsylvania, Local Union 9636; TONY DEROY, McDonald, Pennsylvania, Local Union 9636; GARY METZ, Imperial, Penn-

sylvania, Local Union 9636; LESKO BUGAY, Imperial, Pennsylvania, Local Union; CHARLES M. PRISKARIAL, Imperial, Pennsylvania, Local Union 9636; LYNN GUYAUX, JR., Clinton, Pennsylvania, Local Union 9636; JOHN HALULKO, Joffre, Pennsylvania, Local Union 9636; JOHN BUGAY, Imperial, Pennsylvania, Local Union 9636; EDWARD BOCKOSKI, McDonald, Pennsylvania, Local Union 6754; H. DEAN CLELAND, Clinton, Pennsylvania, Local Union 9636; JOHN DUTKO, Marianna, Pennsylvania, Local Union 2874; ROBERT FIEN, Marianna, Pennsylvania, Local Union 2874; TONY DEANTONIO, Marianna, Pennsylvania, Local Union 2874; MICHAEL ORCHIK, New Kensington, Pennsylvania, Local Union 4426; BRUNO J. KAMINSKI, New Kensington, Pennsylvania, Local Union 6566; WALTER ORZECHOWSKI, Verona, Pennsylvania, Local Union 4426; FRANK BOZICH, New Kensington, Pennsylvania, Local Union 4426; STANLEY THOMAS, Creighton, Pennsylvania, Local Union 4426; CAMILLE DANJOU, Leechburg, Pennsylvania, Local Union 3506; BERNARD RYGIEL, New Kensington, Pennsylvania, Local Union 6344; NICK PETROFF, Russellton, Pennsylvania, Local Union 3506; ALBERT MARKIJOHN, Russellton, Pennsylvania, Local Union 3506; GEORGE MICKLOW, Russellton, Pennsylvania, Local Union 3506; GEORGE ZIETZ, Russellton, Pennsylvania, Local Union 3506; ROBERT BENARDO, Verona, Pennsylvania, Local Union 6132; ATTILIO PRADETTO, 3412 Leechburg Road, Pittsburgh, Pennsylvania, Local Union 6132; LLOYD D. ADAMS, 9125 Pine Street, Pittsburgh, Pennsylvania, Local Union 1993; GLENN EMERICK, McDonald, Pennsylvania, Local Union 1198; WILLIAM FINLEY, Westland, Pennsylvania, Local Union 2026;

Plaintiffs,

v.

MICHAEL BUDZANOSKI, President, District #5, U. M. W. A., Monongahela, Pennsylvania; JOHN SEDDON, Secretary-Treasurer, District #5, U. M. W. A., 2825 Cedar, Bethel Park, Pennsylvania; ROLAND NUCCETELLI, Board Member, District #5, U. M. W. A., 26

Madison, Cokeburg, Pennsylvania; FRANCES McCALLISTER, Board Member, District #5, U. M. W. A., 15 N. Collinwood Drive, Blawnox, Pennsylvania; UNITED MINE WORKERS OF AMERICA, District #5, 938 Penn Avenue, Pittsburgh, Pennsylvania; ALBERT VILCOSS, Board Member, District #5, U. M. W. A. Fridericktown, Pa.; INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, United Mine Workers Building, Washington, D. C.; LOCAL UNION #50, c/o John Seddon, 938 Penn Avenue, Pittsburgh, Pennsylvania; LOCAL UNION # 73, c/o Frank YOPEK, Box 174, Library, Pennsylvania; LOCAL UNION #155, c/o Joseph Lanik, 215 Locust Street, Bentleyville, Pennsylvania; LOCAL UNION #625, c/o George Paulic, 4925 First Street, McKeesport, Pennsylvania; LOCAL UNION #725, c/o Joseph Cherim, Box 624, Imperial, Pennsylvania: LOCAL UNION #1046, c/o Valentia Pradetto, R. D. #1, Box 527, Imperial, Pennsylvania; LOCAL UNION #1349, c/o George Fasekas, Box 7, Smithdale, Pennsylvania; LOCAL UNION #1787, c/o Jack Peters, Richeyville, Pennsylvania; LOCAL UNION #2025, c/o August Bosetti, R. D. #1, Box 337, Smithton, Pennsylvania; LOCAL UNION #2148, c/o James Garner, 130 Brant-hoover, Belle Vernon, Pennsylvania; LOCAL UNION #2242, c/o Joseph Schuester, Box 1, Curtisville, Pennsylvania; LOCAL UNION #3140, c/o Andrew Tarosky, R. D. #1, W. Vandergrift, Pennsylvania; LOCAL UNION #4874, c/o Joseph Stumpf, R. D. #3, McDonald, Pennsylvania; LOCAL UNION #4917, c/o August Demarco, 253 North Main Street, Houston, Pennsylvania; LOCAL UNION #5071, c/o Joseph Dinco, 104 Park Avenue, Bentleyville, Pennsylvania; LOCAL UNION #5085, c/o John Seddon, 938 Penn Avenue, Pittsburgh, Pennsylvania; LOCAL UNION #5600, c/o Hector Preaux, Jr., Box 263, Cecil, Pennsylvania; LOCAL UNION #6160, c/o Joseph W. Dryna, Jr., Box 57, Wildwood, Pennsylvania; LOCAL UNION #6344, c/o Michael Wallace, Box 131, Parnassus Station, New Kensington, Pennsylvania; LOCAL UNION #6385, c/o John Castelnuovo, 372 Harrison Avenue, Leechburg, Pennsylvania; LOCAL UNION #6405, c/o Boyd Kelly, R. D. #2, Box 56, Saltsburg, Pennsylvania; LOCAL

UNION #6478, c/o Alfred Codeluppi, R. D. #4, Blythedale, Pennsylvania; LOCAL UNION #6517, c/o Theophil Bastecki, 59 Chestnut Street, Natrona, Pennsylvania; LOCAL UNION #6542, c/o John Summerville, R. D. #4, Box 445, Leechburg, Pennsylvania; LOCAL UNION #6576 c/o Howard Jones, R. D. #1, Box 474, Freeport, Pennsylvania; LOCAL UNION #6605, c/o Lorenzo Lattanzi, 709 Walnut Street, Clairton, Pennsylvania; LOCAL UNION #6673, c/o Andrew Suvada, Box 18, Salina, Pennsylvania; LOCAL UNION #6831, c/o Frank Damonkis, Pricedale, Pennsylvania; LOCAL UNION #7060; c/o George Gordon, 430 Oneida Valley Road, Butler, Pennsylvania; LOCAL UNION #7107, c/o Leroy Howard, Box 63, Blythedale, Pennsylvania; LOCAL UNION #7447 c/o Julian Gobleck, Jr., R. D. #3, Burgettstown, Pennsylvania; LOCAL UNION #7810, c/o Frank McKenna, Fayette City, Pennsylvania; LOCAL UNION #8097, c/o John Zenkovich, 5406 Broad Street, Baldwin Borough, Pittsburgh, Pennsylvania; LOCAL UNION #8176, c/o Guerrero DePaoli, R. D. #1, Route 18, Hickory, Pennsylvania; LOCAL UNION #8360, c/o Walter R. Lesnett, Box 57, Volant, Pennsylvania; LOCAL UNION #9896, c/o Anthony Terchick R. D. #1, Box 409, Venetia, Pennsylvania; LOCAL UNION #7732, c/o Henry Kagle, Box 5, Cecil, Pennsylvania; LOCAL UNION #8203, c/o John Seighman, R. D. #1, Ruffsdale, Pennsylvania; LOCAL UNION #8857, c/o Charles Stover, R. D. #1, Santiago Road, Imperial, Pennsylvania;

Defendants.

Civil Action No. 70-1011.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 71-1708

MICHAEL BUDZANOSKI, et al.,

Petitioners,

v.

FRANK SABOLSKY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Judgment of the United States Court of Appeals for the Third Circuit was entered March 27, 1972. The petition was due June 26, 1972, and petitioners made no request for extension of time. The petition

was filed June 28, 1972, and must be denied as untimely under the statutory limitations on this Court's jurisdiction, 28 U.S.C. 2101(c).

Respectfully submitted,

Joseph A. Yablonski
Clarice R. Feldman
1763 R Street, N.W.
Washington, D.C. 20009

Kenneth J. Yablonski
505 Washington Trust Building
Washington, Penna. 15301

LE COPY

Supreme Court, U. S.
FILED
AUG 17 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1708

MICHAEL BUDZANOSKI, etc., *et al.*,
Petitioners,

vs.

FRANK SABOLSKY, etc., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

EDWARD L. CAREY, ESQUIRE,
900 15th Street, N. W.,
Washington, D. C. 20005,

LLOYD F. ENGLE, JR., ESQUIRE,
MELVIN P. STEIN, ESQUIRE,
KUHN, ENGLE AND BLAIR,
1512 Frick Bldg.,
Pittsburgh, Pa. 15219,

Counsel for Petitioners.

BATAVIA TIMES, APPELLATE COURT PRINTERS,
EDWARD W. SHANNON, REPRESENTATIVE,
1701 PARKLINE DR., PITTSBURGH, PA. 15227
412-881-7403

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1708

MICHAEL BUDZANOSKI, etc., *et al.*,
Petitioners,

vs.

FRANK SABOLSKY, etc., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

In reply to Respondents' Opposition, Petitioners respectfully offer, for completion of the record in the within matter, the fact that the necessary copies for filing and service of the Petition for Writ of Certiorari were mailed on June 23, 1972 by Batavia Times Publishing Company from the First Class Post Office in Batavia, New York by Special Delivery mail (Appendix A, Affidavit of A. Gerald Kleps).

Subsequently, counsel for Petitioners were advised, by the Office of the Clerk, that the Petitions had not been delivered by the United States Postal Service until June 28, 1972, but that the mailing on June 23, 1972, had been verified from the markings on the package. Petitioners' counsel were also advised that the Petition had been docketed with a time question noted thereon. Since receiving such advice, Petitioners' counsel have been attempting to determine how it could take the United States Postal Service five (5) days to deliver First Class, Special Delivery mail from Batavia, New York to Washington, D. C., but have received no satisfactory explanation.

Petitioners urge that no prejudice has resulted by reason of these circumstances which were not within Petitioners' control, and respectfully request your Honorable Court to consider the Petition, in view of the important questions of federal law involved.

Respectfully submitted,

EDWARD L. CAREY, ESQUIRE,
900 15th Street, N. W.,
Washington, D. C. 200005,

LLOYD F. ENGLE, JR., ESQUIRE,
MELVIN P. STEIN, ESQUIRE,
1512 Frick Bldg.,
Pittsburgh, Pa., 15219.

APPENDIX "A"

Affidavit of A. Gerald Kleps, President of the Batavia Times Publishing Company

THE BATAVIA TIMES PUBLISHING CO.
LAW PRINTERS

A. GERALD KLEPS, President — ARTHUR H. MARSHALL, Secy.-Treas.

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BATAVIA, N. Y. 14020

State of New York)
County of Genesee)ss.: RE: Michael Budzanoski, etc., et al.
City of Batavia)
v.
Frank Sabolsky, etc., et al.

I, *A. Gerald Kleps* being duly sworn say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the *23* day of *June, 1972* we mailed the *petitions for Writ of Certiorari* in the above case for Attorney Lloyd F. Engle, Jr. 1512 Frick Building, Pittsburgh, Pennsylvania. These petitions were mailed as follows:

40 copies to: Hon. E. Robert Seaver, Clerk
U. S. Supreme Court
U. S. Supreme Court Building
First Street, N. E.
Washington, D. C. 20543

five copies to: Kenneth J. Yablonski, Esq.
505 Washington Trust Building
Washington, Pa. 15301

five copies to: Joseph A. Yablonski, Esq.
1812 N. Street, N. W.
Washington, D. C. 20016

These were mailed at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P. M.

A. GERALD KLEPS

Sworn to before me this
3 day of *August*, 19*72*
State of New York
County of Genesee

GEORGE E. SMITH, JR.
GEORGE E. SMITH, JR.
Notary Public, State of N. Y., Genesee County
My Commission Expires March 30, 1974